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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDY REAL,

Defendant and Appellant.

B154473

(Super. Ct. No. KA052682)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Robert W. Armstrong, Judge. Affirmed.

William J. Capriola, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary
Sanchez, Supervising Deputy Attorney General, and David A. Voet, Deputy
Attorney General, for Plaintiff and Respondent.

Randy Real appeals from the judgment entered following his conviction by jury of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187), with personal use of a firearm (Pen. Code, §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)), personal and intentional discharge of a firearm (Pen. Code, § 12022.53, subd. (c)), personal and intentional discharge of a firearm causing great bodily injury (Pen. Code, § 12022.53, subd. (d)), personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)), and for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)), with a court finding that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)). He was sentenced to prison for 55 years to life.

In this case, we hold the trial court did not prejudicially err by failing to instruct that appellant's oral admissions and preoffense statements should be viewed with caution. We hold the trial court properly gave to the jury CALJIC No. 17.41.1. We hold that imposition of punishment for the Penal Code section 12022.53, subdivision (d), enhancement was not barred by Penal Code section 654. Finally, we hold that appellant's prior adjudication for assault with a deadly weapon was a prior felony conviction for purposes of the Three Strikes law.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed,

established that at about 9:48 p.m. on May 28, 2001, 23-year-old Kevin Durden, Michael Wright, 14-year-old Jennifer McElhaney, and her sister, all of whom were unarmed, went by car to an Irwindale gas station. Durden testified that Wright exited and went towards the station when Durden heard a confrontation. McElhaney testified that she heard someone say, ““Where you from?”” Wright responded, ““I’m not from nowhere.””¹

Durden testified that he exited the car and saw Wright talking with appellant and another person who were in appellant’s car. Appellant pulled out a rifle from his car and pointed it at Wright. Durden heard nine to ten gun shots as he saw Wright try to grab the barrel of the rifle, and Durden saw shell casings fall. Wright walked away holding himself, then collapsed. Appellant got into his car and drove away.

Michael Wright testified that he heard appellant yell something about “Duarte Eastside.” Appellant later pointed a gun at Wright’s head. Wright tried to grab the gun, a struggle ensued, and one of appellant’s friends exited appellant’s car and came toward the location. Wright was shot in the right hand. Wright tried to flee, but appellant shot him in the back five times. Wright fled, then fell. As a

¹ McElhaney testified that the shooter was not in the courtroom, but admitted she previously had identified the shooter from a photographic line-up, and admitted she had been scared during the incident and was nervous while she was testifying.

result of the incident, Wright was hospitalized for several weeks, underwent multiple surgeries, and lost the use of a lung.

Leonard Sells testified he was inside the station, where he saw appellant and a woman. The woman called appellant “Shadow.” Sells exited the station behind appellant. As Sells reached his car, he saw Wright exit a car and proceed towards the station. Appellant said something which included the word “Eastside.” Wright did not hear appellant, appellant repeated himself, and Wright turned towards appellant.

Appellant grabbed a rifle from the backseat of a car, “threw the rifle over his shoulder,” and walked towards Wright. When he was about three or four feet away from Wright, appellant “lowered the rifle.” Wright grabbed at the barrel of the gun, and appellant shot him in the hand, chest, throat, and leg. Several other shots were fired. Appellant returned to his car and drove away. Sells identified appellant from photographs and in court.² Police recovered thirteen .22-caliber casings from the shooting scene.

Police testimony established that, on the date of the shooting, appellant was a member of the Duarte Eastside criminal street gang, and his gang moniker was

² Marcelino Roman testified he was in the market at the station when he saw appellant. Roman later exited the market and heard gunshots. Ernesto Villegas was with Roman when Villegas saw appellant inside the station’s market. Villegas knew appellant was an East Duarte gang member whose moniker was Shadow. After leaving the market, Villegas heard a confrontation. Someone said, “[W]here you from?” and someone said, “Eastside.” Villegas saw Wright place his hands near his sides with his palms faced forward. When Villegas heard gunshots, he and Roman drove away.

Shadow. A gang member would ask a person the question ““where are you from?””, to determine why the person was there and to intimidate the person. The Duarte Eastside gang engaged in crimes such as murder and robbery, and its members had committed at least three attempted murders in the last three years. Appellant presented no defense testimony.

CONTENTIONS

Appellant contends that: (1) “[t]he trial court committed prejudicial error by failing to instruct the jury sua sponte that evidence of oral admissions and pre-offense statements by the defendant should be viewed with caution”; (2) “[t]he trial court committed prejudicial error by instructing the jurors that they had a duty to inform on one another”; (3) “[t]he imposition of the additional sentence of 25 years to life pursuant to Penal Code section 12022.53, subdivision (d) violated Penal Code section 654 and must be stricken”; and (4) “[t]he prior juvenile adjudication allegation must be stricken because appellant was not adjudged a ward of the juvenile court for an offense listed within Welfare and Institutions Code section 707, subdivision (b).”

DISCUSSION

1. *The Trial Court Did Not Prejudicially Err By Failing To Instruct That Appellant’s Oral Admissions And Preoffense Statements Should Be Viewed With Caution.*

The trial court failed to give to the jury CALJIC No. 2.71, which defines an admission.³ The trial court also failed to give CALJIC No. 2.71.7, pertaining to the preoffense statement of a defendant.⁴ We assume without deciding that the trial court erred by failing to give sua sponte the above instructions.

Although appellant contends the judgment must be reversed, he does not expressly claim that the alleged instructional error requires reversal of his conviction for attempted murder, the firearm findings (Pen. Code, §§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (c), (d)), or the great bodily injury finding (Pen. Code, § 12022.7, subd. (a)). He does expressly claim that the alleged error requires reversal of the finding that the attempted murder was willful, deliberate, and premeditated, and reversal of the finding that he committed the offense for the benefit of a criminal street gang.

³ That instruction read: “[a]n admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt on the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]”. The trial court gave to the jury CALJIC No. 2.20 regarding believability of a witness; CALJIC No. 2.21.1 (2001 revision) regarding discrepancies in testimony; and CALJIC No. 2.27 regarding sufficiency of the testimony of one witness.

⁴ That instruction read: “Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which [he] [she] is charged was committed. [¶] It is for you to decide whether the statement was made by [a] [the] defendant. [¶] Evidence of an oral statement ought to be viewed with caution.” The trial court did give to the jury CALJIC No. 2.20 regarding believability of a witness; CALJIC No. 2.21.1 (2001 revision) regarding discrepancies in testimony; and CALJIC No. 2.27 regarding sufficiency of the testimony of one witness.

However, in the present case, and apart from any evidence of appellant's statements, there was substantial evidence that, on the date of the shooting, appellant was a member of Duarte Eastside gang, and used the moniker Shadow. Members of that gang had committed such crimes as murder and robbery, and had committed three attempted murders within three years prior to the present offense.

After Wright exited his car, he left inside three people, at least two of whom were young. Wright then went towards the station. Appellant yelled something and a confrontation occurred. Wright was talking with appellant and another person seated in a car. Appellant pulled out a rifle, exited the car, walked towards Wright and, about three or four feet from Wright, pointed the rifle at Wright's head. A struggle ensued between Wright and appellant for the rifle, and appellant's friend emerged from appellant's car and came toward appellant and Wright. Multiple shots were fired, and Wright was shot in the hand, chest, throat, and leg. As Wright attempted to flee, appellant shot him in the back five times. Appellant entered his car and left. Appellant's gang membership provided evidence of motive for his unprovoked confrontation with, and shooting of, Wright.

Thus, leaving aside any evidence of appellant's statements, we conclude that, in light of the strength of the evidence of appellant's guilt, and the court's instructions which provided the jury with adequate guidance on how to determine witness credibility (See fn. 4, *ante*), the alleged instructional error was not prejudicial and does not require reversal of his conviction or the previously

discussed findings. (Cf. *People v. Carpenter* (1997) 15 Cal.4th 312, 393; *People v. Bloyd* (1987) 43 Cal.3d 333, 348; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Love* (1980) 111 Cal.App.3d 98, 106-107.)⁵

2. *The Court Did Not Reversibly Err By Giving CALJIC No. 17.41.1.*

The court instructed on jury misconduct using CALJIC No. 17.41.1 (1998 new).⁶ Appellant claims that the giving of the instruction denied appellant his constitutional rights to freedom of speech and association, jury unanimity, due process, and a jury trial, and constituted reversible error. We disagree. (*People v. Engelman* (2002) 28 Cal.4th 436, 439-449.)

3. *Imposition Of Punishment For The Present Offense And The Penal Code Section 12022.53, Subdivision (d), Enhancement Did Not Violate Penal Code Section 654.*

Appellant's sentence in the present case included imposition of punishment for the present offense, plus an enhancement of 25 years to life pursuant to Penal Code section 12022.53, subdivision (d). Appellant claims such multiple

⁵ Our conclusion that the alleged instructional error was not prejudicial makes it unnecessary to reach the issue of whether appellant's statements were made during, as opposed to before, the present offense with the result that CALJIC No. 2.71.7, which applies to preoffense attempts, was inapplicable.

⁶ CALJIC No. 17.41.1 (1998 new) reads: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

punishment violated Penal Code section 654. We disagree.⁷ The statutory language of Penal Code section 12022.53, subdivision (d), makes clear that imposition of the enhancement must occur “[n]otwithstanding any other provision of law,” including, therefore, Penal Code section 654. (Cf. *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1311-1315, and cases cited.)

4. *Appellant’s Prior Juvenile Adjudication For Assault With A Deadly Weapon Constituted A Prior Felony Conviction Under The Three Strikes Law.*

a. *Pertinent Facts.*

The information alleged that appellant suffered, for purposes of the Three Strikes law, a prior felony conviction for a violation of “PC 245(A)(1)” in November 1995 in case No. GJ07990. At the conclusion of the court trial on the allegation, the court stated that it had “read the file from the juvenile court, in which the defendant was convicted of assault with a deadly weapon, a knife, and willful infliction of great bodily injury.” The court took judicial notice “of the file and of the findings that were made . . . in . . . the sustaining of the petition, the finding of truth of the allegations[.]” in case No. GJ07990. The court commented that the prior offense in case No. GJ07990 was committed with use of a weapon and infliction of great bodily injury, and “constitute[d] a strike within the meaning of the three-strikes law.”

⁷ Appellant correctly concedes that attempted murder is an offense listed in Penal Code section 12022.53, subdivision (a). (Pen. Code, § 12022.53, subd. (a)(1), (18).)

b. *Analysis.*

There is no dispute that, in case no. GJ07990, appellant suffered a prior juvenile adjudication that satisfied the requirements of Penal Code section 667, subdivision (d)(3), and, therefore, constituted a prior felony conviction for purposes of the Three Strikes law,⁸ except to the extent appellant now claims that the requirement of subdivision (d)(3)(D), that the predicate offense must be listed in Welfare and Institutions Code section 707, subdivision (b), was not satisfied.

In case No. GJ07990, appellant suffered a juvenile adjudication for assault with a deadly weapon. Assault with a deadly weapon includes assault by means likely to produce great bodily injury. (*In re Pedro C.* (1989) 215 Cal.App.3d 174, 181-183.) Therefore, appellant suffered an adjudication for assault by means likely to produce great bodily injury for purposes of Welfare and Institutions Code section 707, subdivision (b)(14), and the trial court's imposition of sentence pursuant to the Three Strikes law was proper.

⁸ Penal Code section 667, subdivision (d)(3), states, "Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as: [¶] . . . [¶] (3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense. [¶] (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony. [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code."

DISPOSITION

The judgment is affirmed.

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CROSKEY, J.

We concur:

KLEIN, P.J.

ALDRICH, J.